No. 86-690

In the Supreme Court of the United States

OCTOBER TERM, 1986

DAVID GASAWAY d/b/a
SUBURBAN SEALING COMPANY,

Petitioner,

v.

LABORERS' PENSION FUND AND LABORERS' WELFARE FUND OF THE HEALTH AND WELFARE DEPARTMENT OF THE CONSTRUCTION AND GENERAL LABORERS' DISTRICT COUNCIL OF CHICAGO AND VICINITY,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND MOTION TO AFFIRM JUDGMENT OF THE SEVENTH CIRCUIT COURT OF APPEALS

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STATUTES

MOTION TO AFFIRM JUDGMENT OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, LABORERS' PENSION FUND AND LABORERS' WELFARE FUND OF THE HEALTH AND WELFARE DEPARTMENT OF THE CONSTRUCTION AND GENERAL LABORERS' DISTRICT COUNCIL OF CHICAGO AND VICINITY, respectfully pray this Court pursuant to Supreme Court Rule 16.1 (c), to affirm the judgment of the United States Court of Appeals for the Seventh Circuit entered on June 25, 1986, and the subsequent order denying rehearing, or rehearing en banc on September 9, 1986, as the judgment sought to be reviewed is so unsubstantial as not to need further argument, or merit certiorari, for the reasons demonstrated in Respondents' Response to Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

Respondents submit the following additions to the Statement of the Case found in Petitioner's Petition for Writ of Certiorari.

Petitioner signed a Laborers' Union short form Memoranda of Agreement, (a pre-hire contract), on June 13, 1980 at a job site in Downers Grove, Illinois after consulting with his father, a general contractor. At that time, several Unions were advising the public that Petitioner was not in compliance with area standard wages. Gasaway then voluntarily entered into agreements with the Teamsters, the Operating Engineers and the Laborers Unions.

After executing the contract, Petitioner further evidenced his intent to be bound to the agreement by paying Union initiation fees for two of his employees; Barnes and Petranek. Petitioner was given receipts for all payments made and was furnished a copy of the pre-hire agreement upon execution. He later telephoned the Union Hall to obtain skilled employees.

In his deposition of October 12, 1982, Gasaway stated he requested the Union to furnish him men. (SA60).

Gasaway admits, on page 353, line 20 of the Board transcript regarding a conversation with the late Joe Griffith, Laborers' Business Agent, that;

"Well, we were bargaining, yes or dealing."

He admitted that the Union continued to contact him, (NLRB transcript page 359).

At the time of his deposition and first Answer to the Complaint, which was closer in time to the occurrence, there was no claim that Petitioner's printed name was an act of defiance or that it evidenced or conveyed his intent not to be bound to the agreement.

Suit was filed April 14, 1982 to collect delinquent fringe benefit contributions owing pursuant to the contract. Petitioner's counsel admitted in his Answer filed on August 6, 1982 that the Petitioner executed a valid collective bargaining agreement but raised an affirmative defense of duress. Seven months later, Petitioner's second attorney, adopted duress as a defense, and raised the pre-hire agreement as an additional defense. At no time has a defense relating to improper initiation fee procedures or a violation of 29 USC 186 been asserted by either

counsel as an affirmative defense. It first appeared as an issue in the Motion to Reconsider Entry of Summary Judgment.

Petitioner mailed written notice of a termination of the pre-hire agreement on January 25, 1983, nine months after commencement of the litigation. Then, Petitioner, in a further attempt to repudiate the collective bargaining agreement, filed for an election at the National Labor Relations Board nearly two months after his first repudiation letter.

Petitioner, through counsel, stipulated on September 7, 1985, if liability were established, delinquent fringe benefit contributions owed would amount to $14,127.57.

Cross motions for summary judgment were filed on the liability issue. The Court denied Petitioner's motion; granted Respondents', and entered judgment for a sum certain in an unpublished opinion.

Petitioner filed two motions for reconsideration, both were denied. An appeal to the Seventh Circuit followed. The District Court decision was affirmed in an opinion designated not for publication. Petitioner's Motion for Rehearing with suggestions for rehearing en banc was denied September 9, 1986. This petition for certiorari followed.

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SUMMARY OF ARGUMENT

Respondents submit and request that the Petition for Writ of Certiorari be denied and dismissed and the judgment of the Seventh Circuit be affirmed for the following reasons:

First, it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to require further argument under Supreme Court Rule 16.

Second, the Petition for Writ of Certiorari should be denied and dismissed for the reason that none of the special or important reasons required by Supreme Court Rule 17 exist here. Petitioner moved for Summary Judgment claiming no facts were in dispute and now seeks to raise a host of new issues of fact not considered below.

Third, there is no inconsistency in the Circuit Courts of Appeals or this Court with the application of the Seventh Circuit's interpretation of the law to the facts presented before it.

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ARGUMENT

I. THIS APPEAL FAILS TO WARRANT CONSIDERATION UNDER THE SUPREME COURT RULES

The matter at bar is a routine ERISA collection action brought pursuant to 29 USC Sec. 1145. It does not possess significant legal issues that merit consideration by the United States Supreme Court; nor are there any important questions of federal law or decisions in conflict among other Circuits. This point is best illustrated by the

Seventh Circuit Court of Appeals determination that the opinion did not warrant publication under Seventh Circuit Rule 35, which virtually mirrors Supreme Court Rule 17.

The criteria for publication under Rule 35 (c) are as follows:

"(c) - *Guidelines for Method of Disposition.*

(1) *Published opinions.* A published opinion will be filed when the decision

(i) establishes a new, or changes an existing rule of law;

(ii) involves an issue of continuing public interest;

(iii) criticizes or questions existing law;

(iv) constitutes a significant and non-duplicative contribution to legal literature

(A) by a historical review of law;

(B) by describing legislative history; or

(C) by resolving or creating a conflict in the law;

(v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or

(vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.

(2) *Unpublished orders.* When the decision does not satisfy the criteria for publication, as stated above, it will be filed as an unpublished order. The order will ordinarily contain reasons for the judgment, but may not do so if the court has

> announced its decision and reasons from the bench. A statement of facts may be omitted from the order or may not be complete or detailed."

The Seventh Circuit has already evaluated this case to determine if compelling interest or issues were present and found this case to be wholly lacking. It did not find any conflict in the law between the circuits or any important or novel federal question. Accordingly, the Motion to Affirm the Judgment is warranted as the questions on which the decision depend are so wanting in substance as not to require further argument; *Hodges v. Snyder* 261 U.S. 600, 67 L.Ed 819 (1923).

II. DURESS IS NOT A VALID DEFENSE TO A FRINGE BENEFIT COLLECTION ACTION

The Seventh Circuit determined and Petitioner concedes at p. 16 of his Petition that under the facts presented herein duress could not be established as a defense against Respondents.

This court has recognized that Unions and Fringe Benefit Trust Funds are separate and distinct entities; *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). The acts of peaceful permissible picketing under the publicity proviso of the LMRA could not be a basis of charges against the Plaintiff, but only possibly against a third party, the Union, which has never been a party to this action. Federal labor policy dictates that defenses against a union are not available against third party beneficiaries of collective bargaining agreements such as pension funds, *S. Cal. Retail Clerks v. Bjorklund*, 728 F.2d 1262, 1265-66 (6th Cir. 1984).

This court held, in *Lewis v. Benedict Coal,* 361 U.S. 459, 80 S. Ct. 489 (1960), that a union strike or picketing could not be used as a defense to offset amounts due in fringe benefit fund collection actions.

Similarly, this Court declined certiorari in *Lewis v. Quality Coal,* 279 F.2d 140 (7th Cir. 1959) cert. den., 361 U.S. 929. Therein the Employer claimed the bargaining agreement was void because of duress. The identical defense is claimed at bar. Quality Coal claimed that because of concerted activity and threats by the union, it executed the agreement in order to avoid a work stoppage and strike. The Seventh Circuit at 270 F.2d 143 held:

> "The threat to cause a legal strike and its attendant work stoppage does not of itself constitute duress . . . We find no merit in Quality's claim of invalidity of the agreement because of duress."

The Court also dismissed Quality's contention of lack of mutuality.

Defenses of alleged Union pressure on the Employer through peaceful, permissible picketing to obtain execution of a collective bargaining contract have been uniformly rejected; see *Lewis v. Mill Ridge Coal,* 188 F. Supp. 4 *affd.,* 298 F.2d 552 (6th Cir. 1962); *Lewis v. Collett Coal,* 191 F. Supp. 941 (E.D. Ky. 1960); and *Waggoner v. Dallaire,* 649 F.2d 1362, 1367 (9th Cir. 1981).

The identical defense of alleged Union duress in a fringe benefit fund collection action was raised in *Carpenters Welfare and Pension Fund v. Dombrowski,* 545 F. Supp. 325 (N.D. Ill. 1982). The court rejected the defense and at trial excluded any testimony on this point concluding:

> "An employer should not be permitted to tie up simple contribution actions with this kind of contract law defense really aimed at the Union."

Thus, fraud and duress do not fit within the narrow exception of a *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 102 S. Ct. 851, 70 L.Ed.2d 833 (1982) defense, where a divided court permitted a limited defense only where the very act of making contributions would be intrinsically unlawful, 455 U.S. at 88.

The Seventh Circuit held, in *Trustees of Operative Plasterers and Cement Masons Pension Fund v. Local No. 5*, 794 F.2d 1217, 1229 (7th Cir. 1986); that *Mullins* should *not* apply to a situation where the contract clause requiring the benefit payments is not intrinsically illegal. Thus, the *Mullins* defense strategy has no place at bar. Similarly is *O'Hare v. General Marine Transport*, 740 F.2d 160, 169 (2nd Cir. 1984).

Moreover, under the guise of a *Mullins* type defense, Petitioner asks this court to void the entire contract rather than a specific clause. In *Kaiser Steel v. Mullins* the Court severed only the illegal hot cargo clause that impacted directly on the amounts due. Thus, the relief sought by Petitioner, total exculpation from contract liability is not available under the authority presented to the Court and constitutes an impermissible extension of present labor policy.

In *Mullins* the court was mindful of the legislative history surrounding enactment of 29 USC Sec. 1145 at 455 U.S. 87, 94.

> "Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and

> complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions, this should not be. Senate Committee Labor and Human Resources, 96th Cong. 2d 44."

The Congressional sponsors stated further that they endorsed the holdings of *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), *Huge v. Long's Hauling Co.*, 590 F.2d 457 (3rd Cir. 1978), cert. den. 442 U.S. 918 (1979), and *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962). Thus, the Seventh Circuit's decision is buttressed by the statutory wording of 29 USC 1145 and the congressional intent which adopts the very case upon which the Court relied.

Petitioner does not claim that the fund contributions themselves are illegal. There is no 8(e) hot cargo violation at bar, nor is the *Mullins* anti-trust subcontracting issue present at bar. Accordingly, there is nothing "inconsistent with the law" in making contributions to the Funds as required by 29 USC Sec. 1145.

The judgment of the Seventh Circuit must be affirmed as the questions urged for consideration have been so plainly foreclosed by decisions of this court as to make further argument unnecessary; *Missouri Pac. R. Co. v. Castle*, 224 U.S. 541, 56 L.Ed. 875 (1912).

In *McNeff v. Todd*, 461 U.S. 260 (1983), this Court established that construction industry pre-hire agreements under 29 USC Sec. 158(f) were voidable by the employer, but remain in full force and effect until repudiated.

The unanimous opinion of this court in *Todd* was that monetary obligations assumed by a construction industry

employer under 8(f) contracts could be recovered in Section 301 actions prior to repudiation of the agreement, even though the Union had not attained majority status in the bargaining unit. In deciding this issue, the court expressly rejected *NLRB v. Local 103, Ironworkers* (Higdon), 434 U.S. 335 (1978). This court echoed the identical facts at bar:

> "Although the voidable nature of the pre-hire agreements clearly gave Petitioner the right to repudiate the contract, it is equally clear that Petitioner never manifested an intention to void or repudiate the contract for the relevant period of time."

At bar, the written repudiation and the filing of an election petition did not occur until late in January of 1984, the audit on which Plaintiffs' claim is based, concluded in 1982. Accordingly, the sums shown therein are due and owing as they accrued long before any repudiation occurred.

This Court stated in footnote 11 of the *McNeff* opinion;

> "It is not necessary to decide in this case what specific acts would effect the repudiation of the pre-hire agreement—sending notice to the Union (Gasaway did) . . . or as respondents suggest precipitating a representation election pursuant to the final proviso in Section 8(f) (also as Gasaway did)."

Clearly, the unequivocal acts of repudiation are the written notice which comports to the requirement of 8(d)(1) 29 USC Sec. 158(d)(1) and the filing of a petition for election under Section 9(c) 29 USC Sec. 159(c). The Funds were properly awarded delinquent contributions for

amounts owed prior to repudiation under *Todd v. McNeff* (supra).

III. PETITIONER'S CONDUCT WAS NOT SUFFICIENTLY DEFINITE TO CONSTITUTE REPUDIATION

The Seventh Circuit Court ruled in *International Association v. Higdon Construction Co.*, 739 F.2d 280 (7th Cir. 1984), at page 287;

> "mere non-compliance was not enough to put the Union on notice that the agreement had been repudiated."

Similarly, *Contractors et al., v. Harkins Construction,* 733 F.2d 1321 (5th Cir. 1984) states, "it is only where there is no notice provision that the conduct of the parties may be considered." *Harkins* teaches further at 733 F.2d 1326, that a breach of contract alone will not suffice to establish repudiation.

Paragraph 9 of the Memorandum of Joint Working Agreement to which Defendant was bound expressly provides for "written notice by certified mail."

There can be no legal or factual dispute in light of the case law. Petitioner executed a collective bargaining agreement, admitted in its answer it was bound, and remained bound until it communicated its intent in writing to void the agreement on January 25, 1983.

The Seventh Circuit held herein:

> "Here Gasaway's actions are not sufficiently definite to provide the Union with notice that he was repudiating the agreement prior to his written letter of January 25, 1983." (xxxvi of petition for cert.).

Accordingly, the Seventh Circuit decision must, on this factual matter, be affirmed as it fully complies with the Supreme Court's ruling in *McNeff*.

IV. THERE WAS NO ILLEGAL "PRESSURE" UNDER THE McNEFF DECISION

This court reviewed the concept of duress and pressure vis a vis an 8(f) pre-hire agreement in *McNeff Inc.. Todd* at 461 U.S. 270 footnote 9. The unanimous opinion of the Court was:

> "Petitioner cannot rely on such 'pressure' made lawful by the construction industry proviso to support its contention that it entered the pre-hire agreement at issue in this case involuntarily."

The Seventh Circuit opinion herein duly noted this court's statement of the law and concluded at xxv:

> "The 'pressure' present here as well does not constitute duress."

This conclusion is warranted because the Union's advising the public that Petitioner did not comply with area standard wages is lawful union activity and protected free speech under the First Amendment and 29 USC 158(b) 4(i)(B) which provides:

> "That nothing contained in this clause (B) shall be construed to make unlawful any primary strike or primary picketing."

Petitioner does not contend that the area standards picketing was unlawful. Further, neither the National Labor Relations Board, which has primary jurisdiction in such matters, nor any court below, ever made a determina-

tion that area standards picketing was unlawful or had any unlawful motive. Thus, this question may not be raised here; *Ellis v. Dixson,* 349 U.S. 458 rehearing den. 350 U.S. 855 (1955). Having failed to file an unfair labor practice charge within six months, the 10(b) limitations period, 29 USC Sec. 160(b), the issue is foreclosed.

McNeff does not effect lawful conduct under the LMRA. Thus, the mere presence of area standards pickets cannot constitute coercive pressure or duress as the Seventh Circuit decision herein so held. On this basis alone it must be affirmed.

An employer who claims a collective bargaining agreement is ineffective due to duress or misrepresentation, must take prompt, effective action to rescind the contract. Petitioner cannot wait until sued for non-payment of contributions to take legal action to rescind the agreement; *Lewis v. Owens,* 338 F.2d 740 (6th Cir. 1964), *Lewis v. Mearns,* 168 F. Supp. 134, *affd.* 268 F.2d 427 (4th Cir. 1959). In the absence of illegal activity by the Union, or any action by Petitioner to rescind the agreement the decision of the Seventh Circuit must be affirmed.

Petitioner offers no persuasive authority for its assertion that valid publicity picketing negate not only the fringe benefit provisions, but the contract itself contra to *Mullins* (supra). In both *NLRB v. Local 542,* 331 F.2d 99, and *NLRB v. Carriers,* 285 F.2d 397, unfair labor practice charges against the offending unions were filed and no bargaining agreements were either obtained or set aside. In the former case the picketing was illegal as it had a recognitional purpose when the employer had no operating engineer employees.

The latter case dealt with a secondary boycott situation; neither is present at bar. Petitioner relies further on *UMWA, District 4 v. Otis Elevator Co. Inc.,* 491 F. Supp. 496 (W.D. Pa 1980), an action to compel arbitration on a pre-hire agreement where another union had a majority and a collective bargaining contract. *Otis* is of limited precedential value on the facts at bar and was criticized in *Martin v. Benesh & Bruns Inc.,* 532 F. Supp. 408 at 411 (N.D. Ill 1982).

V. PETITIONER'S AUTHORITY IN INAPPOSITE AS MARLES AND GILLIAM HAVE NO APPLICATION TO THE SITUATION AT BAR

The Seventh Circuit properly concluded that neither *Caporale v. Marles,* 656 F.2d 252 (7th Cir. 1981), nor *Operating Engineers v. Gilliam,* 737 F.2d 1501 (9th Cir. 1984) as each applies to a peculiar factual situation that does not exist herein. The Seventh Circuit stated that misrepresentation and the "*Marles* situation is not present here", (xxii). These are important distinctions as each case was decided upon full factual determinations made after a trial on the merits. At bar no facts were in dispute and each side moved for summary judgment pursuant to Rule 56.

As the Seventh Circuit noted, *Marles* is of slight precedential importance, as the factual scenario at bar is inapposite. Moreover, it has been distinguished by virtually every court[1] to cite it including the Seventh Circuit

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[1]*Carpenters v. Haberman,* 751 F.2d 771 (5th Cir.)
Thelin v. Mitchell, 576 F.Supp. 1404, 1408 (N.D. Ill. 1983)
Painters Fund v. Johnson, 566 F.Supp. 592, 595 (W.D. Mo. 1983)

in *Operating Engineers v. Bliudzius*, 730 F.2d 1093 (7th Cir. 1984).

Similarly, *Gilliam* has not been cited in any reported decision beyond the Ninth Circuit. That court, in reviewing the decision in *Southwest Administrators Inc. v. Rozays Transfer*, 791 F.2d 769 (9th Cir. 1986), virtually distinguished away *Gilliam's* application to only those situations in which a party is induced to believe the nature of his act is something entirely different than it actually is.

Herein the Seventh Circuit applied the same logic and properly held:

> "Gasaway does not claim ignorance of the document he signed; he does not claim misrepresentation regarding its contents." (xxii)

As the court's holding does not vary from that of the Ninth Circuit and is in conformity with its own application of its *Marles* opinion it must be affirmed.

VI. PETITIONER FAILED TO SHOW ANY ILLEGALITY OR VIOLATION OF 302(c)(4)

On the record before this court there is no threat or intimidation attributable to the Laborers Union. In Gasaway's deposition the remarks quoted in Petitioner's statement of facts were attributed to the Teamsters.

Petitioner now devotes a major portion of its memorandum to an argument that was created in its first Motion for Reconsideration at the District Court level—an alleged violation of 29 USC Sec. 186. This was never presented as an affirmative defense to the Complaint nor in Petitioners' Motion for Summary Judgment.

It is uncontroverted that Gasaway received receipts for all monies paid to the Laborers Union. Copies of the check and receipts appeared in Petitioner's supplemental appendix. Accordingly, the trial court properly held:

> "The Court does not find the illegality argument to have much substance. While Defendant claims that there was unlawful conduct regarding initiation fees, constituting bribery and extortion, he presents no supporting documentation to indicate that payment was not made in accordance with 29 USC 186(c)(4)." (viii)

Even assuming some insignificant procedural error under 302(c)(4) it in no event would effect the payment of fringe benefit contributions under 302(c)(5). There is no claim that Respondents are guilty of any illegality or that this alleged wrongdoing, if it existed, impacts on the computation of Welfare or Pension payments.

Gasaway cannot raise this alleged breach of public policy as a defense in either law or equity. In law, defendant is equally guilty pursuant to 302(a)(1) and 302 (a)(2) of a criminal act; *U.S. v. Pecora*, 798 F.2d 614 (3rd Cir. 1986).

In equity, he would be guilty of unclean hands, laches and estoppel, as this alleged wrong was not timely raised to avoid the contract early on, or raised as an affirmative defense to the action, it cannot now constitute a defense.

A. 29 USC 186(e) DOES NOT SUPPORT PETITIONER'S CONTRACT DEFENSE

In order to "create" a contract defense Petitioner has taken its weakest argument below, determined by the District Court to be "entirely without substance" (xiv,

vii), as, "he presents no supporting documentation to indicate payment was not made in accordance with 29 USC 186(c)(4)" (viii) and elevated it to a key issue herein.

The Seventh Circuit duly noted, at xxiii, that Gasaway was asserting:

> "That the conduct of the unions constituted a violation of the racketeering provisions of the NLRA and thus the agreement was illegal and should not be enforced by a federal court."

However, the Seventh Circuit dismissed the defense and affirmed the judgment of the District Court.

Petitioner claims that a technical violation of 29 USC 186(c)(4) occurred when the Employer paid dues on behalf of two employes after executing a contract with the Union. Petitioner alleges that as the money was not deducted from the wages of employees pursuant to a written assignment from the employees, the dues payment was illegal. As long as the money was not deducted from the employees' wages without their consent there can be no violation of the statute.

Conversely, Petitioner claims that despite the execution of the contract, the payment of dues by the employer violates 302(a). Thus, Petitioner is now claiming the dues payments made, for which receipts were issued by the Union, was a pay off which is contrary to all the evidence herein; *U.S. v. Pecora*, 798 F.2d 614, 618 (3rd Cir. 1986).

Section 302(e), 29 USC 186(e) *Jurisdiction of the courts*, empowers district courts:

> "to restrain violation of this Section."

McCaffery v. Rex Motor Transportation, 672 F.2d 246 (1st Cir. 1982), held that Federal District Courts lack

jurisdiction under Section 302 of the LMRA to entertain suits under Section 302(e) but only to "restrain violations" of Section 302. As this alleged violation occurred in May, 1980; the limitation period is now past for present restraint.

Bowers v. Moreno, 520 F.2d 843 at 846 (1st Cir. 1975) held:

> "Any ultimate relief would be limited to enjoining future payment and would not include the undoing of deeds done."

Gasaway seeks to have the Court undo his execution of the contract, a deed which occurred over 6 years ago and was repudiated in writing three years ago.

Award Service Inc. v. Pension Fund, 763 F.2d 1066 (9th Cir. 1985), reviewed the extent of the forms of relief available under Section 302(e). The Court quoting from its earlier opinion in *Souza v. Teamster Pension Trust,* 663 F.2d 942, (9th Cir. 1981), held that nowhere is it shown in the legislative history that the section intended to provide anything more than injunctive relief for restraints of future violations. *Award Service* states further that the Court cannot remove the limitation which Congress placed on the exercise of that jurisdiction.

There is no proof of any impropriety in the Union's handling of Funds, and neither the District nor the Circuit Court found any violation of 302(c)(4) or any merit to the contention of the existence of wrongdoing.

Petitioner's 302(c)(4) defense is directed to a collateral matter and not to the portion of the agreement for which enforcement is sought. Under *Kaiser Steel v.*

Mullins, it cannot be considered as it does not impact directly on the computation of fringe benefit contributions or their legality.

This is *not* a Union action to enforce dues checkoff provisions of the contract. Such clauses are separate and distinct from fringe benefit contribution requirements. This newly created defense might be considered if it had been properly and timely asserted as an affirmative defense to the Complaint. But, under *Kaiser Steel*, it has no place in a 29 USC 1145 ERISA benefit collection action. More importantly, 302(e) would not bestow upon the Court jurisdiction to afford the relief sought of dissolution of the contract.

Petitioner is hard pressed to prove illegality when he executed a contract requiring payment of dues and initiation fees and received receipts for all monies paid.

The cases cited by Petitioner are criminal actions brought by the United States government pursuant to 29 USC Sec. 186(d) for willful violations done with an intent to benefit the individual or labor official. There is no showing of such conduct. No such criminal action was ever commenced by the Government, no determination of illegality, other than Petitioner's bald assertion, was ever made. The District Court and the Seventh Circuit were correct in finding Petitioner's arguments to be without merit. Accordingly, the decision below must be affirmed.

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CONCLUSION

Respondents pray that the Judgment of the Seventh Circuit Court of Appeals be affirmed and the Petition for Writ of Certiorari be denied as it is manifest that the questions raised are so unsubstantial as not to require further argument as:

1. Petitioner has failed to demonstrate that the Ruling of the Seventh Circuit is in conflict with another Federal Court of Appeals or a decision of this Court.

2. No compelling issue of federal law is present to warrant review on certiorari.

3. The Seventh Circuit did not view the opinion to be of sufficient weight or authority to even merit publication.

Accordingly, Respondents pray that judgment be affirmed and certiorari be denied.

Respectfully submitted,

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